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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

JACK BURNS, Plaintiff and Appellant, v. HENRY SCHMITT et al., Defendants and Respondents.	A113286 (Sonoma County Super. Ct. No. SCV-232740)

Plaintiff Jack Burns appeals after the superior court entered an order enforcing a settlement agreement and ordering him to release all his claims. We affirm.

I. BACKGROUND

The scanty record before us does not reveal the nature of the dispute between the parties.[1]

After trial had begun in this matter and a jury had been chosen, the parties reached a settlement. The following colloquy took place: "The Court: We're back on the record.

[1] Burns elected to proceed with an appendix in lieu of a clerk's transcript pursuant to California Rules of Court, rule 5.1, but failed to file an appendix. The record on appeal consisted originally of only the reporter's transcript of the October 5, 2005, hearing at which the settlement was reached. At respondents' unopposed request, the record was augmented to include the transcript of the March 8, 2006, hearing on a motion for reconsideration. We have also reviewed the January 12, 2006, order granting the motion to enforce the settlement, from which Burns has appealed, which was included with the civil case information statement, and the Sonoma County register of proceedings in this matter, dated February 24, 2006, which was attached to the notice designating record on appeal.

Counsel are present, parties are present. I understand there may be a resolution of the matter; is that correct? [¶] [Burns's trial counsel]: That is, Your Honor. [¶] The Court: As I understand, it's [*sic*] $20,000 will be paid on behalf of the defendants in return for a standard release and dismissal of the entire action; is that right? [¶] [Burns's trial counsel]: It is, Your Honor." Counsel for the parties then agreed that the parties would bear their own costs and attorney fees and that there would be a confidentiality agreement. The jury was excused.

Defendants moved to enforce the settlement agreement, and on January 12, 2006, the trial court granted the motion and ordered Burns to execute a settlement agreement and release all claims.

At a March 8, 2006, hearing in which it denied a motion for reconsideration, the trial court explained its reasons for denying the motion, stating: "There were a good many discussions, and [Burns's trial counsel] requested that I have those discussions with Mr. Burns and [his counsel] as well. I had those discussions. I told Mr. Burns that, frankly, his case, if he took it to trial, would, in my opinion, end up in a defense verdict. It was a very weak liability case and he was probably going to, in my opinion, end up on the wrong end of a verdict. And at the end of that, he chose to take the offer of what I believe was $20,000." The judge went on to explain that Burns had had "a lot of conversations with [his trial counsel]. He was present in court when we announced the terms of the settlement. He had no objection to that settlement." The court explained Burns's later actions as "buyer's remorse."

II. DISCUSSION

Burns's sole contention on appeal is that the settlement was not enforceable because he did not expressly agree to it on the record.

Code of Civil Procedure section 664.6 (section 664.6) provides in pertinent part: "If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement."

In ruling on a motion under section 664.6, the trial court acts as a trier of fact to determine whether the parties entered into a valid and binding settlement. The court may receive oral and written testimony, and "[i]f the same judge presides over both the settlement and the section 664.6 hearing, he may avail himself of the benefit of his own recollection." (*Kohn v. Jaymar-Ruby, Inc.* (1994) 23 Cal.App.4th 1530, 1533 (*Kohn*), citing *Richardson v. Richardson* (1986) 180 Cal.App.3d 91, 97.) The trial court's findings are reviewed for substantial evidence. (*Kohn, supra*, 23 Cal.App.4th at p. 1533.) The question of whether an oral agreement must be made on the record, however, is one of law that requires independent review. (See *Murphy v. Padilla* (1996) 42 Cal.App.4th 707, 711.)

Burns points out correctly that the consent of the parties themselves, and not merely of their attorneys, is necessary to create an enforceable settlement. Thus, in *Levy v. Superior Court* (1995) 10 Cal.4th 578, 586, our Supreme Court held unenforceable a settlement agreement signed by an attorney, rather than by the party himself. Following *Levy*, the court in *Johnson v. Department of Corrections* (1995) 38 Cal.App.4th 1700, 1707-1709 (*Johnson*), refused to enforce a settlement reached in negotiations between a judge and the parties' counsel, where the plaintiff had not personally informed the court he accepted the terms of the agreement.

Here, on the other hand, there is evidence that Burns personally accepted the terms of the settlement during judicially supervised proceedings. He contends, however, that section 664.6 requires the parties to agree to the settlement *on the record*. Both the history of section 664.6 and the case law construing it belie this contention. During 1993, an amendment to section 664.6 required oral settlement agreements to be "on the record before the court" to be enforceable. (Stats. 1993, ch. 768, § 1, p. 4260.) The statute was again amended in 1994 to delete the words "on the record." (Stats. 1994, ch. 587, § 7, p. 2912.)

Case law confirms that statements made during judicial settlement conferences, even if not made on the record, can fall within the scope of section 664.6. The court in *Johnson* noted that the requirement a settlement be agreed to "before the court" was

satisfied by an oral agreement made during judicially supervised settlement negotiations. (*Johnson*, *supra*, 38 Cal.App.4th at pp. 1707-1708, 1709, citing *In re Marriage of Assemi* (1994) 7 Cal.4th 896, 906.)[2]

In *Kohn*, the parties reached an agreement at a settlement conference presided over by the judge who later ruled on the motion to enforce the agreement. (*Kohn*, *supra*, 23 Cal.App.4th at pp. 1532, 1534.) The appellant refused to comply with the agreement, and on the respondent's motion, the trial court granted the motion to have judgment entered pursuant to section 664.6. (*Kohn*, at pp. 1532-1533.) The Court of Appeal concluded substantial evidence supported the trial court's ruling, noting that the minutes of the settlement conference stated a settlement was reached, the respondent's counsel confirmed the terms of the settlement in a letter the day after the conference, the appellant did not object to the terms recited by the respondent's counsel, and the judge who presided over both the settlement conference and the section 664.6 hearing stated that the terms of the settlement recited in the motion were those agreed to at the settlement conference. (*Kohn*, at pp. 1533-1534.)

The court in *Fiege v. Cooke* (2004) 125 Cal.App.4th 1350, 1355-1356, also upheld a settlement agreement where counsel for the parties' insurers, but not the representatives of the insurers themselves, stated on the record their assent to the settlement. Representatives of the insurers—who had the right to settle the case—were present when their counsel agreed to the settlement and did not object when the court asked whether anyone disagreed with its stated terms. In addition, the reporter's transcript made plain that the representatives and counsel had discussions with the court before counsel recited the terms of the settlement on the record.

Here, the recollection of the judge who presided over the settlement conference, the section 664.6 hearing, and the motion for reconsideration indicates that Burns spoke personally with the judge and agreed to the terms of the settlement. Burns was present in

[2] *Johnson* went on to note that the plaintiff there had never personally informed the court that he accepted the terms of the agreement, and that absent that personal involvement, the agreement was not enforceable under section 664.6. (*Johnson*, *supra*, 38 Cal.App.4th at p. 1709.)

court when the settlement was announced on the record and did not object. While the better practice would be to secure the parties' assent to the settlement on the record, the totality of the evidence presented here is sufficient to render the settlement enforceable.

III. DISPOSITION

The judgment is affirmed.

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RIVERA, J.

We concur:

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READON, Acting P. J.

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SEPULVEDA, J.